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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

Attorneys for Plaintiff eBay Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY INC.,

Plaintiff,

v.

DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1 - 20,

Defendants.

Case No. C 08-4052

FIRST AMENDED COMPLAINT FOR

(1) Violations of 18 U.S.C. § 1030
(2) Violations of 18 U.S.C. § 1962(c)
(3) Fraud
(4) Violations of California Pen. Code § 502
(5) Restitution and Unjust Enrichment
(6) California B&P Code § 17200;

DEMAND FOR JURY TRIAL

For its First Amended Complaint, Plaintiff eBay Inc. alleges as set forth below. The factual allegations set forth herein have evidentiary support or, to the extent they are contained in a paragraph made on information and belief, likely will have evidentiary support after a reasonable opportunity for further investigation or discovery.

PARTIES

1. At all times relevant herein, Plaintiff eBay Inc. ("eBay") was a corporation

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organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California.

2. eBay is informed and believes and, on that basis, alleges that at all times relevant herein Defendant Digital Point Solutions. Inc. was a California corporation, doing business in the State of California.

3. eBay is informed and believes and, on that basis, alleges that at all times relevant herein Defendant Shawn Hogan was an individual residing and doing business in the State of California.

4. Defendants Digital Point Solutions, Inc. and Shawn Hogan will be collectively referred to herein as "DPS."

5. eBay is informed and believes and, on that basis, alleges that at all times relevant herein Defendant Kessler's Flying Circus was a California general partnership doing business in the State of California.

6. eBay is informed and believes and, on that basis, alleges that at all times relevant herein Defendant Thunderwood Holdings, Inc. was a California corporation and was a general partner of Defendant Kessler's Flying Circus.

7. eBay is informed and believes and, on that basis, alleges that at all times relevant herein Defendant Brian Dunning was an individual residing and doing business in the State of California and was the sole owner of Defendant Thunderwood Holdings, Inc.

8. eBay is informed and believes and, on that basis, alleges that at times relevant herein Dunning Enterprise, Inc. (a/k/a Dunning Enterprises, Inc.) was a California corporation doing business in the State of California and was a general partner of Defendant Kessler's Flying Circus.

9. eBay is informed and believes and. on that basis, alleges that at all times relevant herein Defendant Todd Dunning was an individual residing and doing business in the State of California and was either a general partner of Defendant Kessler's Flying Circus or held a controlling interest in Dunning Enterprise, Inc., which was a general partner of Defendant Kessler's Flying Circus.

10. eBay is informed and believes and, on that basis, alleges that at all times relevant herein Defendant BrianDunning.com was a website and/or business entity through which Defendants Brian Dunning and/or Todd Dunning committed some or all of the acts alleged herein.

11. Defendants Kessler's Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise, Inc., BrianDunning.com, Brian Dunning, and Todd Dunning will be collectively referred to herein as "KFC."

12. eBay is ignorant of the true names and capacities of defendants sued herein as Does 1 through 20, inclusive, and therefore sues said defendants by such fictitious names. eBay will amend this complaint to allege the true names and capacities of said defendants when they are ascertained. eBay is informed and believes and, on that basis, alleges that each of the fictitiously named defendants is responsible in some manner to pay the obligations described herein, and that eBay's losses as alleged herein were proximately caused by said defendants' conduct.

13. Unless otherwise specified, DPS, KFC and Does 1-20 will be referred to collectively herein as "Defendants."

JURISDICTION AND VENUE

14. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1367.

15. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)(1), 1391(b)(2) and 1391(c), and 18 U.S.C. § 1965(a).

16. Pursuant to the User Agreements entered into by Defendants Shawn Hogan, Brian Dunning and Todd Dunning, as discussed *infra*, they have consented to the jurisdiction of and venue in the Northern District of California.

INTRADISTRICT ASSIGNMENT

17. Assignment to the San Jose Division is proper pursuant to Local Rules 3-2(c) and (e) because a substantial part of the events or omissions that give rise to eBay's claim occurred in San Jose, Santa Clara County, California. eBay's corporate

headquarters are located in San Jose, Santa Clara County, California, and Defendants' wrongful actions were specifically directed at and intended to affect eBay in San Jose, Santa Clara County, California as discussed in detail below.

GENERAL ALLEGATIONS

eBay's Affiliate Marketing Program

18. eBay offers to the public an online marketplace that enables trade on a local, national and international basis. Through eBay's website, sellers may list items for sale and buyers may bid on and purchase items of interest. eBay earns revenue when a seller places an item for sale and when the item is sold. eBay may also earn revenue depending on various features selected by the seller, *e.g.*, listing upgrades and photo displays.

19. eBay's Affiliate Marketing Program is designed to increase traffic to eBay's website through the placement of advertisements for eBay on third-party websites. eBay seeks to increase traffic to its site so that more people will be exposed to eBay's service and begin using eBay to buy or sell goods, thereby generating revenue for eBay. The persons and entities that advertise on behalf of eBay—whether on their own sites or on sites of other third parties—are known as "affiliates." eBay's Affiliate Marketing Program is intended to compensate affiliates only when the advertisement in question causes a user to take some action at eBay's site that directly provides revenue to eBay or indicates that the new user is likely to take such an action in the future. Accordingly, affiliates earn commissions payable by eBay under the Affiliate Marketing Program when the following sequence of events occurs: (1) the affiliate publishes an eBay advertisement, (2) a user clicks on the eBay advertisement and is directed to eBay's website (the "Referred Visit"), and (3) that user subsequently engages in a commission-generating event (a "Revenue Action"). Revenue Actions, include, by way of example: (1) becoming a new, registered user of eBay within 30 days of the Referred Visit, or (2) purchasing an item from a third-party seller on eBay within seven days of the Referred Visit. Because compensation to the affiliate is tied to actions by the user, it is essential that eBay be able to determine whether a Revenue Action occurred by virtue of the fact that the user was

referred to eBay by a particular affiliate's advertisement. eBay and/or Commission Junction, Inc. ("CJ") tracks this information using information placed in the new user's browser, as discussed below.

20. At all relevant times, eBay used the services of CJ, a subsidiary of ValueClick, Inc., in administering the Affiliate Marketing Program. The relationship between eBay and CJ was governed at all relevant times by various Advertiser Service Agreements. Under those agreements, CJ was responsible for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance by affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds remitted by eBay.

21. eBay's obligation to pay commissions is tracked by matching a user's Revenue Actions on eBay's site to the affiliate that directed the user to eBay. This tracking is accomplished through the use of a digital tag called a "cookie" that is stored in the user's web browser. Cookies are collections of data commonly used by websites to store and associate useful information with a given user. Cookies typically store information such as usernames, passwords, and user preferences for a particular user; that information makes it more efficient for users to access web pages and provides a means for websites to track and authenticate users. Cookies are placed or "dropped" in a user's browser by a website when that user visits the website.

22. In the case of eBay's Affiliate Marketing Program, cookies are used to confirm that a user was directed to eBay from a specific affiliate. Specifically, when a user clicks on an affiliate advertisement and is directed to eBay's site, eBay's site drops a cookie on the user's computer. That cookie identifies the site that referred the user to eBay and/or the specific affiliate responsible for directing the traffic to eBay. If the user later engages in a Revenue Action within the specified time period, eBay and/or CJ determines—based on the data in the cookie—which affiliate, if any, should be credited with the referral and receive the commission. If cookies from multiple affiliates are present on the user's computer, the most recent cookie dropped is credited with the

Revenue Action. If there is no qualifying cookie on the computer, then no affiliate is credited.

23. As part of the services it renders with respect to eBay's Affiliate Marketing Program, CJ pays affiliates on a periodic basis (usually monthly), with funds remitted by eBay, based on the number of Revenue Actions taken by users referred by those affiliates.

The Fraudulent "Cookie Stuffing" Schemes

24. "Cookie stuffing" is a term used to describe the forced placement of a cookie on a computer, typically by causing a cookie from a particular website to be placed on the user's computer without the user knowing that he or she visited the website that placed the cookie. DPS and KFC engaged in cookie stuffing intended to defraud eBay. The allegations set forth in paragraphs 24-30, 36-37, 42-43 and 50-51 below describing Defendants' cookie stuffing schemes based on eBay's information and belief are based on eBay's analysis of the Defendants' websites and/or technology and the way in which a user's web browser interacts with Defendants' sites and/or technology, and on eBay's analysis of historical data relating to traffic purportedly driven to eBay by Defendants. Certain other details regarding Defendants' cookie stuffing schemes are exclusively within Defendants' control.

25. eBay is informed and believes and, on that basis, alleges that DPS and KFC each accomplished their cookie stuffing through software programs and/or code that, unbeknownst to the user, redirected the user's computer to the eBay website without the user actually clicking on an eBay advertisement link, or even becoming aware that they had left the page they were previously viewing. As a result, the eBay site would be prompted to drop an eBay cookie on the user's computer even though the user never clicked on an eBay advertisement or even realized that their computer had ever visited the eBay site.

26. eBay is informed and believes and, on that basis, alleges that the software programs utilized by each of DPS and KFC caused the user's computer to access eBay's computers in an unauthorized way and/or to exceed the authorized access to eBay's

computers because that access occurred solely to force the dropping of the eBay cookie and thereby wrongfully associate future Revenue Actions, if any, by that user with DPS or KFC.

27. eBay is informed and believes and, on that basis, alleges that once the cookie was stuffed on the user's computer by one or more of the Defendants, any future Revenue Actions initiated by that user when the user later visited eBay intentionally, and not as a result of any advertisement placed by Defendants, appeared to be eligible for commissions payable to one of the Defendants (provided those actions took place within the prescribed periods of time). Hence DPS or KFC would receive payment for actions by users who had not been referred to eBay by Defendants' advertisements, thereby injuring eBay.

28. eBay is informed and believes and, on that basis, alleges that DPS and/or KFC used certain technological measures to prevent eBay from discovering their wrongdoing. At certain relevant times DPS and/or KFC used technology that would stuff cookies on only those computers that had not been previously stuffed by that Defendant. The purpose of this action was to avoid discovery by eBay and/or CJ of evidence of stuffing—e.g., that a single user had multiple cookies pointing to the same affiliate or that there was an abnormal ratio of cookies placed by DPS and KFC to the Revenue Actions attributable to users referred by DPS and KFC—and thereby conceal the schemes from eBay and CJ's monitoring activities. In addition, at certain relevant times DPS and/or KFC used technology that would avoid stuffing cookies on computers that appeared to be geographically located in San Jose, California (the location of eBay's headquarters) or Santa Barbara, California (the location of CJ's headquarters). The purpose of this action was to evade efforts by eBay and/or CJ to detect the cookie stuffing mechanism if they attempted to observe the wrongdoing from their normal places of business.

29. eBay is informed and believes and, on that basis, alleges that DPS also used at least one additional technological measure to conceal its wrongdoing: DPS used images placed on web pages to effectuate its cookie stuffing scheme, and caused those

images to be so small that they were effectively invisible to the user and, accordingly, difficult to detect.

30. eBay is informed and believes and, on that basis, alleges that KFC also used at least one additional technological measure to conceal its wrongdoing: KFC used JavaScript code contained in web pages to effectuate its cookie stuffing scheme, and purposefully obscured the purpose and effect of that code so that, even when that code was discovered, it was difficult to determine its actual effect. This caused KFC's cookie stuffing to be difficult to detect, whether by human or machine efforts.

31. eBay is informed and believes and, on that basis, alleges that in addition to these technological measures, DPS and KFC each actively sought to prevent detection by eBay and CJ by explicitly denying to eBay and/or CJ that any wrongdoing had occurred. For example, when Shawn Hogan was contacted by CJ in connection with suspicions of cookie stuffing by DPS, he attributed the suspicious activity to "coding errors," which he later purported to have "corrected."

32. As a result of the cookie stuffing schemes employed by DPS and KFC, eBay paid commissions (via CJ) to each of DPS and KFC for a substantial number of Revenue Actions that were in no way related to referral of any user by either DPS's or KFC's advertisements and for which neither DPS nor KFC were due compensation.

FIRST CAUSE OF ACTION

(Violations of 18 U.S.C. § 1030)

33. eBay realleges each and every allegation set forth in Paragraphs 1 through 32, inclusive, and incorporates them by reference herein.

34. Through their cookie stuffing schemes as described above, DPS and KFC each knowingly, intentionally and with intent to defraud accessed eBay's computers without authorization and/or exceeded their authorized access to eBay's computers in order to further their fraudulent schemes.

35. DPS's and KFC's access of eBay's computers was unauthorized because the only purpose of that access was to defraud eBay. In addition, Defendants Shawn

Hogan's, Brian Dunning's and Todd Dunning's access of eBay's computers was unauthorized and/or exceeded their authorized access, because each was a registered eBay user and each had agreed to be bound by the eBay User Agreement in effect at the time. The User Agreements accepted by each of Defendants Shawn Hogan, Brian Dunning and Todd Dunning were substantially similar. The User Agreements (a) prohibited the use of any "device, software or routine" to interfere with or attempt to interfere with the proper working of the eBay site or any activities conducted on the eBay site, and (b) required compliance with all applicable laws regarding the use of eBay's servers. Defendants Shawn Hogan, Brian Dunning and Todd Dunning, through their cookie stuffing schemes, violated those User Agreements and in so doing, accessed the eBay computers without authorization and/or exceeded their authorized access.

36. eBay's computers are used in interstate and foreign commerce.

37. Through their unauthorized access, Defendants DPS and DOES 1-10 fraudulently obtained commissions for Revenue Actions that were in no way related to those Defendants' advertisements and for which those Defendants were due no compensation. Upon information and belief, through their unauthorized access, Defendants DPS and DOES 1-10 also caused harm to eBay's computers and caused loss to eBay in each year from at least December 2003 through June 2007, aggregating more than $5,000.

38. Through their unauthorized access, Defendants KFC and DOES 11-20 fraudulently obtained commissions for Revenue Actions that were in no way related to those Defendants' advertisements and for which those Defendants were due no compensation. Upon information and belief, through their unauthorized access, Defendants KFC and DOES 11-20 also caused harm to eBay's computers and caused loss to eBay in each year from at least December 2004 through June 2007, aggregating more than $5,000.

39. DPS's and KFC's actions constitute violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

40. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as more fully set forth below.

SECOND CAUSE OF ACTION

(Violations of 18 U.S.C. § 1962(c))

41. eBay realleges each and every allegation set forth in Paragraphs 1 through 40, inclusive, and incorporates them by reference herein.

42. Defendants Shawn Hogan's, Brian Dunning's, and Todd Dunning's unlawful, tortious and otherwise actionable conduct constitute violations of 18 U.S.C. § 1962(c).

43. Defendant Shawn Hogan and DOES 1-10 (the "Hogan Group") engaged in activities through the company Digital Point Solutions, Inc., which constitutes an enterprise under RICO. Through Digital Point Solutions, Inc., the Hogan Group associated with each other and others for the common purpose of defrauding eBay of commission fees by designing and implementing the cookie stuffing scheme described above. Upon information and belief, the Hogan Group's activities were ongoing, and Digital Point Solutions, Inc. functioned as a continuing unit in operating the fraudulent cookie stuffing scheme from approximately December 2003 through June 2007.

44. Defendants Brian Dunning, Todd Dunning and DOES 11-20 (the "Dunning Group") engaged in activities through the companies Kessler's Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise, Inc., and BrianDunning.com, and each company constitutes a RICO enterprise. Through Kessler's Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise, Inc., and BrianDunning.com, the Dunning Group associated with each other and others for the common purpose of defrauding eBay of commission fees by designing and implementing the cookie stuffing scheme described above. Upon information and belief, the Dunning Group's activities were ongoing, and Kessler's Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise, Inc., and BrianDunning.com functioned individually, and with each other, as continuing units in operating the fraudulent cookie stuffing scheme from approximately December 2004

through June 2007.

45. The members of the Hogan Group and Dunning Group each committed multiple violations of the predicate act of mail and wire fraud, 18 U.S.C. § 1343, through their cookie stuffing schemes. Specifically, schemes to defraud eBay existed by which the members of the Hogan Group and Dunning Group each stuffed eBay cookies onto computers for the purpose of defrauding eBay of commission fees due only for legitimate Revenue Actions associated with a given affiliate. The members of the Hogan Group and Dunning Group each participated in these schemes with the specific intent to defraud eBay of commissions. Use of the Internet was essential to the schemes: the members of the Hogan Group and Dunning Group stuffed a cookie onto a computer when a user was browsing the Internet, and the stuffed cookie was later read and recognized when that Internet user accessed eBay's website on the Internet and either registered with the site, purchased an item or engaged in some other Revenue Action. The members of the Hogan Group and Dunning Group each, by use of their technology, caused users' web browsers to convey a representation by the Hogan Group and/or the Dunning Group to eBay that the user had accessed the eBay website via an advertisement placed by either DPS or KFC, when in fact, a substantial portion of those users never knowingly or intentionally visited the eBay website based on an advertisement placed by either DPS or KFC. These fraudulent acts and representations were repeated multiple times, and each act constitutes a violation of 18 U.S.C. § 1343 through the use of interstate wires.

46. Each violation of 18 U.S.C. § 1343 constitutes a separate instance of "racketeering activity" as defined in 18 U.S.C. § 1961(1) and was committed in furtherance of the conspiracy to defraud eBay of commission fees not legitimately earned by either DPS or KFC. Together, these violations constitute a pattern of racketeering activity: the violations have the same or similar purposes, results, participants, victims and/or methods of commission.

47. The racketeering activity committed by each of the members of the Hogan Group and Dunning Group affected the interstate activity of Internet web browsing. In

addition, Internet marketing, including the marketing at issue here that utilizes advertisements seen by Internet users in all 50 states and provides commissions for actions taken by eBay users across all 50 states, is also an interstate activity that was affected by the racketeering activity committed by each of the members of the Hogan Group and Dunning Group.

48. The actions of each of the members of the Hogan Group and Dunning Group were undertaken with fraud, malice or oppression, or with a conscious disregard of the rights of eBay and, therefore, eBay is entitled to an award of exemplary and punitive damages against each of the members of the Hogan Group and Dunning Group, in an amount according to proof at trial.

49. WHEREFORE, eBay prays for judgment against each of the members of the Hogan Group and Dunning Group, as more fully set forth below.

THIRD CAUSE OF ACTION

(Fraud)

50. eBay realleges each and every allegation set forth in Paragraphs 1 through 49, inclusive, and incorporates them by reference herein.

51. DPS and DOES 1-10, by use of their cookie stuffing computer programs and/or code, caused users' web browsers to convey a representation by those defendants to eBay that the user had accessed the eBay website via an advertisement placed by DPS. eBay is informed and believed and, on that basis, alleges that this conduct began in or around December 2003 and continued through at least June 2007.

52. KFC and DOES 11-20, by use of their cookie stuffing computer programs and/or code, caused users' web browsers to convey a representation by those defendants to eBay that the user had accessed the eBay website via an advertisement placed by KFC. eBay is informed and believed and, on that basis, alleges that this conduct began in or around December 2004 and continued through at least June 2007.

53. The representations made and/or caused to be made by each of DPS, KFC and DOES 1-20 were in fact false. The true facts were that a substantial portion of the

users ostensibly referred by each of DPS, KFC and DOES 1-20 to the eBay site had not been referred by those Defendants, that those users had never knowingly or intentionally visited the eBay site based on any advertisement or referral from any of those Defendants, and that the information contained in cookies in those users' web browsers was actually the product of the false and misleading cookie stuffing schemes employed by each of DPS, KFC and DOES 1-20.

54. When DPS, KFC and DOES 1-20 made these representations (or caused them to be made), they knew them to be false and made these representations (or caused them to be made) with the intention to deceive and defraud eBay and induce eBay to act in reliance on these representations.

55. eBay, at the time these representations were made (or caused to be made) by DPS, KFC and DOES 1-20, was ignorant of the falsity of the representations and believed them to be true. In reliance on these representations, eBay was induced to, and did, make commission payments to each of DPS and KFC (via CJ) in consideration for referrals that eBay believed to be legitimate and bona fide. Had eBay known the true facts, it would not have made such commission payments. eBay's reliance on the representations of DPS, KFC and DOES 1-20 was justified.

56. As a proximate result of the fraudulent conduct of each of DPS, KFC and DOES 1-20, eBay paid commissions and fees to DPS and KFC (via CJ) for referrals that had never occurred, for which eBay received no value, and for which eBay owed nothing to DPS or KFC.

57. As a proximate result thereof, eBay has been damaged in an amount to be proven at trial.

58. Defendants' actions were undertaken with fraud, malice or oppression, or with a conscious disregard of the rights of eBay and, therefore, eBay is entitled to an award of exemplary and punitive damages against each of DPS, KFC and DOES 1-20, in an amount according to proof at trial.

59. WHEREFORE, eBay prays for judgment against each of DPS, KFC and

DOES 1-20, as more fully set forth below.

FOURTH CAUSE OF ACTION

(Violations of California Penal Code § 502)

60. eBay realleges each and every allegation set forth in Paragraphs 1 through 59, inclusive, and incorporates them by reference herein.

61. Each of DPS and KFC have knowingly and without permission: altered, damaged, deleted, destroyed, or otherwise used eBay's computer, computer system, or computer network in order to devise and execute a cookie stuffing scheme or artifice in order to defraud and deceive; and/or altered, damaged, deleted, destroyed, or otherwise used eBay's computer, computer system, or computer network in order to wrongfully control or obtain money and property; and/or accessed or caused to be accessed eBay's computer, computer system, or computer network.

62. DPS's and KFC's unauthorized access and use of eBay's computers has damaged and caused loss to eBay.

63. DPS's and KFC's actions constitute violations of California Penal Code § 502(c).

64. DPS's and KFC's actions were undertaken with fraud, malice or oppression, or with a conscious disregard of the rights of eBay and, therefore, eBay is entitled to an award of exemplary and punitive damages against each of DPS and KFC, in an amount according to proof at trial.

65. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as more fully set forth below.

FIFTH CAUSE OF ACTION

(Restitution and Unjust Enrichment)

66. eBay realleges each and every allegation set forth in Paragraphs 1 through 65, inclusive, and incorporates them by reference herein.

67. Through their cookie stuffing schemes, as described above, each of DPS and KFC received a benefit from eBay, in the form of artificially and fraudulently inflated

commissions paid to DPS and KFC (via CJ) for Revenue Actions that were not associated with any referral from those Defendants.

68. In light of DPS's and KFC's conduct. it would be unjust for DPS and KFC to retain the benefits they obtained from eBay.

69. DPS and KFC have been unjustly enriched by eBay's payments and should be required in equity to make restitution of these payments to eBay.

70. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as more fully set forth below.

SIXTH CAUSE OF ACTION

(California Business and Professions Code § 17200)

71. eBay realleges each and every allegation set forth in Paragraphs 1 through 70, inclusive, and incorporates them by reference herein.

72. Through their cookie stuffing schemes, as described above. each of DPS and KFC engaged in unlawful, unfair and/or fraudulent business practices. Such conduct by each of DPS and KFC violates California Business and Professions Code § 17200 et. seq.

73. As discussed herein, DPS's and KFC's business practices of engaging in cookie stuffing were unlawful under state and federal laws, including but not limited to the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the civil RICO statute, 18 U.S.C. § 1962(c), California Penal Code § 502, and constituted common law fraud.

74. DPS's and KFC's conduct was also fraudulent and deceptive, and was unfair to eBay, in that it offended established public policy, and/or was immoral, unethical, oppressive, unscrupulous and substantially injurious to eBay.

75. As a direct result of DPS's and KFC's conduct, eBay has suffered an injury in fact and has lost money and/or property that has been wrongfully retained by each of DPS and KFC.

76. WHEREFORE, eBay prays for judgment against each of DPS and KFC, as more fully set forth below.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, eBay prays for judgment against Defendants, and each of them, for:

i. Judgment in favor of eBay and against all Defendants on all causes of action;

ii. An award of compensatory damages according to proof at trial;

iii. An award of punitive damages according to proof at trial;

iv. An award of treble damages against Defendants Shawn Hogan, Brian Dunning and Todd Dunning, pursuant to 18 U.S.C. § 1964 according to proof at trial;

v. An award requiring Defendants to disgorge all ill-gotten gains and to return the eBay funds by which Defendants have been unjustly enriched;

vi. An award of restitution, according to proof at trial;

vii. An injunction prohibiting Defendants from (a) disseminating, sharing or otherwise making available any cookie stuffing technology to others; (b) possessing, disseminating, sharing, or otherwise making available any technology intended or capable of being used to defraud eBay; and (c) having any further involvement with any person or entity participating in the eBay Affiliate Marketing Program;

viii. An award of pre-judgment and post-judgment interest;

ix. An award of attorney's fees and costs of suit incurred herein; and

x. Such other further relief as the Court may deem just and proper.

Dated: October 7, 2008

O'MELVENY & MYERS LLP

By: ______________________

David R. Eberhart, Esq.
Sharon M. Bunzel, Esq.
Colleen M. Kennedy, Esq.
Attorneys for Plaintiff eBAY INC.

DEMAND FOR JURY TRIAL

eBay hereby demands a trial by jury of all claims in this action.

Dated: October 7, 2008

O'MELVENY & MYERS LLP

By: [signature]

David R. Eberhart, Esq.
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Colleen M. Kennedy, Esq.
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